626a In United States Court of Appeals for the Fifth Circuit

No. 18547

TENNESSEE GAS TRANSMISSION COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 18597

MANUFACTURERS LIGHT & HEAT COMPANY, THE OHIO FUEL GAS COMPANY, UNITED FUEL GAS COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

Transcript of hearing

October 19, 1960

[File Endorsement Omitted.]

Members of the Court present: Hon. Richard T. Rives, Chief Judge; Hon. Elbert P. Tuttle, U.S. Circuit Judge; Hon. John M. Wisdom, U.S. Circuit Judge.

626b APPEARANCES

For Petitioner Tennessee Gas Transmission Company: Harry Littman, Jack Werner, and Harold Talisman, Esqs., of counsel.

For Petitioners-Manufacturers Light & Heat Company, The Ohio Fuel Gas Company, United Fuel Gas Company: Brooks E. Smith, Esq.

For Respondent: Peter H. Schiff, Esq.

For the City of Pittsburgh: David Stahl and Hurzel Plaine, Esqs.

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626c COLLOQUY BETWEEN COURT AND COUNSEL FOR RESPONDENT

Judge RIVES. The thing that worries me about our position, or your position, Mr. Schiff, is that it seems to me you are asking us to let rates go into effect, a reduction in rates, tentative reduction, even this will not be a legally prescribed rate, it will be subject to change later on, and when all of the elements that go into the rate-making have not been passed on administratively. That is something that I didn't understand had occurred in any of these other interim orders that you cited. It seems to me that all of the elements probably that went into the rate-making had been passed on administratively, but I may be mistaken there.

Mr. SCHIFF. I believe if you examine these cases you will find that the procedure applied in these cases is precisely the same as involved here.

Judge RIVES. Did you have the allocation of cost problem?

Mr. SCHIFF. No. I concede there was no question of rate design. I would like to read in a minute a quote from the Panhandle case to indicate that this is not the only area where there may be variations and the result may be that a
626d company after an interim rate order may not obtain its full cost of service that might be permitted if it had filed the proper rate.

Now, in our response, the three cases we cite, I didn't give the page citations and it might be convenient if you would take those; it is on page 4 of our response, it is the Natural Gas Pipeline case, Supreme Court case. The pages of particular interest are 583 to 584.

Judge TUTTLE. Give us the volume, too.

Mr. SCHIFF. 315 U.S. The case starts at page 575.

Judge WISDOM. 583?

Mr. SCHIFF. That is right. I believe the appropriate page citation in the State Corporation of Kansas case, 206 Federal 2nd, is already in our response; and in the Panhandle Eastern case, which is 236 Federal 2nd, at page 666, the most pertinent pages are pages 608 to 609.

Now, the Natural Gas Case, which the Supreme Court decided in 1942 at very near the beginning of the regulation un-

der the Natural Gas Act, what the Commission did there, as here, it accepted the company, the Natural Gas Pipeline had presented all of its evidence, as I read the case. The Commission, for the purposes of that order, accepted a portion of the presentation of the Natural Gas Pipeline Company. This is what we have done here. We have accepted Tennessee's case, the basis on which they proposed to increase rates, in
626e their entirety, except as to the rate of return issue on which we have given a full hearing.

And the Natural Gas cases, the same thing was done, and as we point out in our response, the Supreme Court indicated that a party cannot complain about the fact that we have accepted the case that they asked us to accept.

Judge TUTTLE. Are you saying in effect that if it turns out that New England rates that are being charged or would be charged in order to get a yield or return of 6⅛ per cent are ultimately found to be too high——

Mr. SCHIFF. Too low, I think.

Judge TUTTLE. No, let me see, too high, and it should be lower and that a higher rate should be charged in the Eastern Zone and a lesser rate should be charged in the New England zone, that the company can't complain because the company fixed that rate, initially proposed that rate, and it is presumed to have done it correctly and if it hasn't done it correctly, it is their fault and nobody else's fault?

Mr. SCHIFF. That is precisely our position.

Judge TUTTLE. There is no guarantee that the rates that they proposed will actually yield 6.8 per cent?

Mr. SCHIFF. That is precisely our position.

Judge RIVES. Is that position good?

Mr. SCHIFF. Yes, sir.

Judge RIVES. Don't they have to take a pretty good
626f guess as to what the allocation of costs is going to be and aren't these local people in the zones more concerned with that than the parent company here, than the Tennessee Company?

Mr. SCHIFF. As to the last supposition, I am not sure. I think that the Pipeline Company does have some interest. It isn't merely a stakeholder. I think the rates it has in effect in particular zones may affect the sales it may be able to make in those zones.

But passing that, the situation in this case is no different than any other rate case. Now, under the Natural Gas Act the proponent of a rate files that rate. The Commission may suspend it and after five months it will go into effect subject to refund if the Commission so orders, that is a legally prescribed rate. They can't charge any other rate.

Now, taking the example that Mr. Littman gave to you before on its $12 million, saying that they supposedly had a $12 million increase, well, our point, position is this, even if we accepted, the company comes in and says we need $12 million more than we have been collecting up to now, the Commission says, "Yes, that is correct, we agree with you." and even if we accepted a total cost of service, we may still determine, however, that they have been collecting too much in one zone and too little in another zone, so that the consequences that Tennessee ascribes to our order or to the
626g interim order are simply the consequences present in every rate case. And what Tennessee is asking here, and more precisely the Columbia System is asking here, is that even if the commission is right on the 7 per cent, even though the Commission is perfectly right that those rates are too high, that they are unjust and unreasonable, still we have to be allowed to charge our customers unjust and unreasonable rates until every other issue is determined.

May I say the situation would be the same if Tennessee had filed a rate based on a rate of return of 10 per cent or 50 per cent, it would be exactly the same thing. They would be claiming that we can collect padded rates until the whole case is finished. And we suggest that in determining whether or not to grant a stay, that the whole rate-making process can be undercut if either the Commission or the Courts were to grant a stay automatically in every case, regardless of how little merit there is to the position on the merits.

626h Mr. SCHIFF. The suggestion here is that in some way that the interim rate cases we have cited can be dis-
626i tinguished because the allocation question or the rate design question is still pending. Comparable suggestions seem to have been made in the Panhandle case, 236 Federal 2nd, and there the Court said at page 608, I have already given you the page citation, I am only reading part of their quote, but they say, "Panhandle must have based its claim for higher rate of return upon justification existing at the time of filing. It is difficult to see how else a change could have been proposed in good faith. True, in recognition of the time involved in these often long, drawn out rate proceedings, the Commission quite properly permits the basic showing of the justification which existed at the time of the filing to be supplemented by evidence of occurrences since filing. But this is far from saying that a party who tries and fails to make out a prima facie showing to support several elements of his claim is entitled to postponement of adjudication thereon in anticipation of possibly new justification which some future event may supply before the overall case can be completed."

This we say is precisely the situation here. Tennessee is saying we have filed rates based on 7 per cent. All right, maybe we can't justify them. In the other phase of the case they claim we are wrong on that, but maybe they say we can't justify it, but that maybe at the end of the case after our opponents have presented evidence, or even after the
626j staff have presented evidence, maybe then we can justify evidence, and therefore in the meantime we have to be able to collect rates which we cannot now on our own terms justify.

We say that this motion is totally untenable and that Tennessee has not made any showing that there is a likelihood that they may prevail and that these earlier cases are full justification for the interim rate procedure in this case.

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630 In United States Court of Appeals for the Fifth Circuit

No. 18547

TENNESSEE GAS TRANSMISSION COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 18597

THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY, UNITED FUEL GAS COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PETITIONS TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

Order of the Court Denying stay pending review

October 28, 1960

Before RIVES, Chief Judge, and TUTTLE and WISDOM, Circuit Judges

631 PER CURIAM: All of the Judges are of the opinion that the petitioners have not made a strong showing of any likelihood that this Court will invalidate the Commission's determination that 7% is higher than a fair rate of return for Tennessee Gas Transmission Company. Judges Rives and Tuttle are of the further opinion that the petitioners have not made a sufficient showing of any likelihood that any party

will suffer irreparable loss because Tennessee Gas Company's method of allocating costs among different zones may ultimately be successfully challenged.

The Motions for Stay Pending Review of the Rate Orders of the Federal Power Commission, are, therefore, Denied.

WISDOM, Circuit Judge, Dissenting:

In my opinion, it is unreasonable, if not unlawful, in this case, for the Commission to specify a rate of return for Tennessee Gas Transmission Company when at the time of issuing the order the Commission knows that there is a likelihood that the company cannot possibly realize the rate of return. Here, the determination of the rate of return is so dependent on the determination of the allocation of costs among the six zones Tennessee services that the two issues can not be separated.

The interim order requires Tennessee to make immediate refunds to all its customers, undercharged distributors as well as overcharged distributors. The Columbia companies, which operate in Zones 2, 3 and 4, contend that they bear such a disproportionate share of the costs of Tennessee's services that, in effect, they are subsidizing Tennessee's distributors in Zones 1, 5 and 6. Tennessee must now make refunds on the present allocation of costs. If Columbia's challenge to the allocation is successful, Tennessee will be required to make additional refunds to distributors in Zones 2, 3 and 4. But Tennessee will not be able to recover adequate costs of services from the undercharged distributors in Zones 1, 5 and 6. Tennessee, therefore, if Columbia is successful, will be unable to realize the rate fixed by the Commission as just and reasonable.

632

The allocation issue has been tried and briefed in another proceeding involving Tennessee. It is ripe for decision. I see no reason then for the Commission not to put the horse where he belongs—in front of the cart.

668 In United States Court of Appeals for the Fifth Circuit

No. 18547

[Title omitted.]

No. 18567

[Title omitted.]

ON PETITION FOR REHEARING ON MOTION FOR STAY WHICH WERE DENIED BY ORDER DATED OCTOBER 28, 1960

Order denying rehearing on motions for stay

Filed November 21, 1960

Before RIVES, Chief Judge, and TUTTLE and WISDOM, Circuit Judges

PER CURIAM:

The petition of the Manufacturers Light and Heat Company, The Ohio Fuel Gas Company, and United Fuel Gas Company for a rehearing on motions for stay denied October 28, 1960, is Denied.

Judge Wisdom Dissents.

670 In United States Court of Appeals

Minute entry of argument and submission

May 29, 1961.

[Title omitted.]

On this day this cause was called, and after argument by Harry S. Littman Esquire, and Brooks E. Smith, Esquire for petitioners, and Peter H. Schiff, Esquire, Attorney Federal Power Commission, and Robert E. Jameson, Esquire, for Intervenor, was submitted to the Court.

* * * * *

671 In United States Court of Appeals for the Fifth Circuit

No. 18547

TENNESSEE GAS TRANSMISSION COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 18597

THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY, AND UNITED FUEL GAS COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Opinion

August 2, 1961

672 Before TUTTLE, Chief Judge, CAMERON and WISDOM, Circuit Judges

TUTTLE, Chief Judge: These two petitions for review of orders of the Federal Power Commission attack, from somewhat different points, interim orders finding a 6⅛% rate of return just and reasonable, and putting said rate of return into effect before resolving other issues touching on the allocation of costs between different zones of operation of Tennessee Gas Transmission Company. Generally the name "Tennessee" will be used interchangeably with petitioner, and the name "Columbia Companies" will be reserved to discuss the petition of Manufacturers Light and Heat Company, The Ohio Fuel Gas Company and United Fuel Gas Company.

The history of the proceedings leading up to the orders complained of is taken almost completely from the statement in petitioner's brief. In using such statement we have, however, eliminated some expressions of opinion and explanatory statements:

Tennessee owns and operates a natural gas pipeline system extending in a northeasterly direction from its sources of supply in Texas and Louisiana through the States of Texas, Louisiana, Arkansas, Mississippi, Alabama, Tennessee, Kentucky, West Virginia, Ohio, Pennsylvania, New Jersey, New York, Massachusetts, New Hampshire, Rhode Island and Connecticut. The rates charged by Tennessee for the transportation of natural gas and sales for resale of natural gas in interstate commerce are subject to the jurisdiction of the Commission under the Natural Gas Act (15 U.S.C. 717–717w).

673 On October 5, 1959, Tennessee filed with the Commission, pursuant to Section 4(d) of the Natural Gas Act, schedules of rate changes designed to recover the increased cost of providing natural gas service. These schedules set forth the respective rates proposed by Tennessee for each type of service in each rate zone on the Tennessee system. The Tennessee system is divided into six rate zones, with rates differing among the zones to give effect to distance, as well as other factors.

By order issued November 4, 1959, the Commission ordered a hearing to determine the "lawfulness" of the rates which had been filed. Following a five-month period of suspension, the rates became effective April 5, 1960, subject to an undertaking by Tennessee, required by Commission order, to "refund at such times and in such manner as may be required by final order of the Commission, the portion of the increased rates found by the Commission in this proceeding not justified, together with interest thereon at the rate of 7 percent per annum."

Hearings commenced on February 2, 1960, and continued intermittently until recessed on May 25, 1960. During the course of the hearings, Commission Staff Counsel moved that the hearing be divided into two phases. He proposed that the first phase deal solely with the issue of rate of return, and the remaining issues be reserved for a later stage of the proceeding. Staff Counsel further proposed that upon completion of the first phase of the proceeding, the Examiner's decision be omitted; that the Commission issue a decision determining the fair rate of return for Tennessee; and that the Commission

674 issue an interim order requiring Tennessee to reduce its rates and make refunds, in the event the Commission concluded that the fair rate of return is less than claimed by Tennessee.

When Staff Counsel made his motion, there was pending before the Commission, in another proceeding involving Tennessee (Docket No. G–11980), an issue as to the proper method of allocating Tennessee's cost of service among its six rate zones and various services. By order issued April 30, 1959, in Docket No. G–11980, the Commission ruled that determination of the allocation issue should be expedited and, to that end, severed that issue for separate and prior hearing and determination in that case. At the time Staff Counsel made his motion, the allocation issue had been thoroughly tried and briefed and was before the examiner for decision. Additionally, the Examiner in the instant proceeding had ruled that the determination of the allocation issue in Docket No. G–11980 would govern the method of allocating Tennessee's cost of service in this case. Since it contended that determination of the allocation issue was required in order to translate the cost of service into rates for the various zones and services, Tennessee filed a memorandum opposing the Staff's motion for an interim order on the ground, inter alia, that such order would be illegal unless the Commission simultaneously determined the allocation issue. On July 19, 1960, Tennessee filed a motion with the Commission requesting it to determine the allocation issue simultaneously with the issue of rate of return. By order issued August 5, 1960, the Commission denied Tennessee's motion.

On August 9, 1960, the Commission issued its order, hereinsought to be reviewed, adopting the Staff's interim
675 order procedure. As stated above, by such order the Commission disallowed Tennessee's claim for a 7 percent return, fixed a 6¼ percent rate of return, required Tennessee to file reduced rates retroactively to April 5, 1960, and required Tennessee to make refunds for the differences in rates collected since April 5, 1960. The Commission's order did not, however, make any determination as to the proper method of cost allocation which should be employed in allocating the reduced cost of service among the six rate zones on the Tennessee system. Nor did the Commission make a determination as to which of the various rates filed by Tennessee were unlawful, which rates should properly be reduced, or to whom refunds were lawfully due. Instead, the Commission left these questions open for later determination.

On August 29, 1960, Tennessee filed its application for rehearing which the Commission denied by its order issued Sep-

tember 27, 1960. On October 3, 1960, Tennessee filed its petition to review with this Court and simultaneously filed a motion for stay of the Commission's order. On October 28, 1960, this Court, with one Judge dissenting, denied the motion for stay.

Although Tennessee summarizes its extended specifications of error by placing them in five numbered paragraphs,[1] we discuss them under two headings:

676 (1) The rate of 6⅛ percent was based on findings "unsupported by substantial evidence and is unreasonably low."

(2) The Commission erred in putting a rate less than 7 percent into effect by an interim order prior to determining whether the cost allocations between the six zones were lawful.

Considering first the 6⅛ percent rate, we find that the Commission had before it a full record disclosing sufficient economic

[1] This summary is as follows:

"1. The Commission erred in allowing Tennessee an over-all rate of return of only 6⅛ percent. Such rate of return is confiscatory, deprives Tennessee of property without due process of law in contravention of the Fifth Amendment of the Constitution of the United States, and constitutes discriminatory, arbitrary and capricious action against Tennessee.

"2. The 6⅛ percent rate of return is based on findings unsupported by substantial evidence and is unreasonably low in that:

"a. It fails to yield a return on common book equity commensurate with returns being earned by enterprises having corresponding risks.

"b. It is unjustifiably less than the rate of return allowed by the Commission in its most recent decisions to pipeline companies having a more secure capital structure than Tennessee.

"c. It fails to provide the margin of safety over the cost of debt necessary to prevent the quality of Tennessee's senior securities from deteriorating and being downgraded.

"3. The Commission arbitrarily required Tennessee to reduce the rate of return on its natural gas production properties even though the Commission set for further hearing the issue of the rate of return to be allowed on such properties.

"4. The Commission erred in the computation of Tennessee's capital structure in failing to include as common equity capital the convertible preferred stock which was in the process of being converted into common stock, and in failing to include in the capital structure mortgage bonds which had been issued by a Tennessee subsidiary.

"5. The Commission illegally and arbitrary set aside Tennessee's rates, without deciding the cost allocation issue, which decision was necessary in order for the Commission to determine which, and to what extent, the individual zone rates filed by Tennessee were unlawful."

factors to permit it to determine what was a just and reasonable return. Both Tennessee and the Commission recognize that the standard and principles to be observed in testing the correctness of the Commission's findings are to be found
677 in the two cases: Bluefield Waterworks & Improvement Co. v. Public Service Commission of W. Virginia, 262 U.S. 679, 692, and Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591.

The petitioner greatly stresses the following language from the Hope case:

"* * * the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. * * *"

Although the Commission does not counter by emphasizing any particular language of the opinion, we cannot overlook the following:

"* * * It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. Cf. Railroad Commission v. Cumberland Tel.
678 & Tel. Co., 212 U.S. 414; Lindheimer v. Illinois Bell Tel. Co., supra, pp. 164, 169; Railroad Commission v. Pacific Gas & Electric Co., 302 U.S. 388, 401." 320 U.S. 591, 602.

In stressing the language, "The return to equity owners should be commensurate with returns on investments in other enterprises having corresponding risks," petitioner argues extensively from the tables showing average earnings of the ten major pipelines over an eight-year period ending with 1958 and for the 41 pipeline companies comprising the entire industry over a ten-year period ending in 1959. It also strongly

emphasizes the fact that the 6⅛ percent return will yield the lowest return on common stock equity for any of its years of operation.[2]

The weakness of this approach is twofold: (1) There is no basis for Tennessee's implied assumption that it or any of the pipeline companies are entitled to the same return on book equity which they have historically enjoyed. "A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally." Bluefield Waterworks & Improvement Co. v. Public Service Commission, supra, p. 893. (2) The Commission found that petitioner was not an "average" pipeline company but rather that it is one of the largest and soundest. It is thus a non sequiter for petitioner to argue that because the eight or nine year average return on common equity of a group of companies
679 has been higher than 10.12 percent then that rate is not just and reasonable for Tennessee for 1960.

The Commission specifically stated that it did "give consideration to the evidence of the return on book equity of Tennessee as compared to the other major pipeline companies as a factor in fixing a return which is commensurate with returns on investments of other enterprises having corresponding risks." With the evidence touching on the returns on book equity of other major pipeline companies present in the record, we cannot find, as invited to do by petitioner, that this statement of the Commission is without foundation.

Petitioner strongly attacks the weight attributed by the Commission to the "earnings-price" ratios of Tennessee as bearing on its competition for the investor dollar. We think it clear that the Commission used such comparison to test the degree to which the investing public considered the return to be "commensurate" with other pipeline companies. Touching on this matter the Commission said, "Such data indicate that Tennessee enjoys a favorable and improving position in the money market in relation to the rest of the industry."

We have carefully analyzed the criticisms levelled by the petitioner on both the method used by it and its conclusions

[2] It is not disputed that the 7 percent overall return sought by Tennessee would have provided a 12.70% return on the book value of Tennessee's common equity capital or that the 6⅛ percent overall return would provide a 10.12 percent return on common equity.

explaining its reason for adopting the 6⅛ percent rate of return, and we find them to be without substance on the record before us. Moreover, we find no merit in the contention that the Commission erred, in the computation of Tennessee's
680 capital structure, in failing to include as common equity capital the convertible preferred stock which was in the process of being converted into common stock and in failing to include in the capital structure mortgage bonds which had been issued by a Tennessee subsidiary. We consider the treatment given to these two items by the Commission as well within its discretionary powers.

We next come to the challenge of the Commission's applying the 6⅛ percent rate of return to Tennessee's natural gas production properties before a determination was made as to whether a different rate of return was justified for these properties. The Commission answers this complaint in two ways. It says, first, that Tennessee did not distinguish, in its application for a 7 percent overall rate, between the rate of return it was entitled to receive on its production properties from the overall rate. We think this is not an adequate answer, because a larger return for production properties may well have been recovered under a 7 percent overall rate, whereas this might not be the case under a 6⅛ percent overall rate if production properties were later found to be entitled to a higher rate of return. However, as to the second point urged by the Commission, we think it fully answers petitioner's contention. In allowing 6⅛ percent rate of return, the Commission postponed for future consideration the treatment to be afforded substantial amounts received by petitioner through its treatment of federal income tax provisions for statutory depletion and intangible well-drilling costs. The Commission concluded that if Tennessee shows that it is entitled to a higher return on that part of its capital that is represented by production
681 properties, this can be provided for when the Commission makes a final disposition of the treatment of the two tax benefits reserved for later consideration.

We next come to the complaint that the Commission could not legally enter the interim order denying the 7 percent rate of return and inviting the filing of new schedules based upon a 6⅛ percent rate so long as there remained unresolved the

question whether the allocations of cost among the six zones of operation would ultimately be approved by the Commission.

A majority of the Court, with the writer of this opinion dissenting, concludes that the Commission could not legally effectuate its order requiring the 6⅛ percent rate of return to be given effect until it had made its determination as to the proper allocation of cost of service among the several zones. The following part of the opinion, written by Judge Wisdom, and concurred in by Judge Cameron, becomes the Court's opinion touching on this phase of the appeal:

WISDOM, Circuit Judge: On April 30, 1959, in another proceeding involving Tennessee, in Docket No. G–11980, the Commission issued an order stating:

"It is our view that separate and prior hearing on the issues relating to the principles and methods to be applied toward allocation of costs among the zones on Tennessee's system and among the classes of service within the zones will aid in the disposition of this proceeding and may be of similar aid in disposition of proceedings in Docket No. G–17166."

682 The Examiner in this proceeding rules that the cost allocation as determined in Docket No. G–11980 would govern the allocation of service in this case. The cost allocation issue is ready for decision.

What the Commission in 1959 considered a reasonable and orderly sequence of proceedings seems equally reasonable and orderly now.[3]

The Commission's refusal to decide the cost allocation issue means that there is no basis for determining which of the filed rates in specific zones are unlawful, the extent to which individual rates should be reduced, or to whom refunds are due. Meanwhile, the effect of the interim order is to continue the alleged discriminatory differential in favor of Zones 1, 5, and 6, although the Columbia companies, operating in Zones 2, 3, and 4, for several years have been endeavoring to have the Commission determine a proper cost allocation among the zones. Tennessee will be injured, because it will not be able to recover adequate costs of services from the undercharged distributors in Zones 1, 5, and 6. For that matter, Tennessee would be

[3] In Tennessee Gas Transmission Co., FPC Docket No. G–5259, the Commission issued an order holding that it would be "premature," "unfair" and "improper" to issue an interim order before determining pending allocation issues.

injured if it were entitled to an overall return of 7 percent on its investment. It will be injured in any case because of the retroactive effect that will follow from the Commission's belated determination of cost allocation. This effect works in favor of Tennessee's overcharged customers, who are entitled to refunds, but works against Tennessee since it may not recoup from undercharged customers. Tennessee, therefore,
683 will be unable to earn the return the Commission considers just and reasonable, no matter what that rate is.

It is true, of course, that the allocation of costs in all six schedules was made by Tennessee; that if these allocations are correct and are approved Tennessee will not be damaged; that the burden rests on the applicant to justify each rate increase. But conditions change, costs are not static, and rates are at best an educated guess. It seems that in filing rates a public utility should not be held, at its peril, to the requirement of foretelling the decision of the Commission on the correctness of the rates. The statute appears to have been designed on the assumption filed schedules will have to be adjusted. Lawful rates may be determined only after a full hearing; until the Commission fixes rates the utility is protected by being allowed to collect at the filed rate but under bond and subject to refund, and the consumer is protected by the refund of excess charges with 7 percent interest.

We question whether the hearing in which the cost allocation issues was excluded was the "full hearing" contemplated in Section 4(e) of the Act. We question whether the order, issued after a hearing in which the issue of cost allocation was barred, is a lawful order. It seems, too, that, when the retroactive effect of the eventual determination of cost allocation makes it highly unlikely, if not impossible, for a utility to earn a "just and reasonable return," such an interim order lacks the weight and legal effect courts properly give to most orders of the Commission. Finally, regardless of the Commission's authority to issue the order, we hold that cost allocation among zones is such an essential element in determining
684 whether the filed rates are excessive that it is unreasonable and an abuse of discretion to issue an interim rate order before deciding a pending allocation issue ripe for decision.

PER CURIAM:

The Court concludes that the manner in which the foregoing opinions can be given effect is to approve the order of the Commission as to all matters dealt with by it in the challenged order except its decision that the order was to become effective prior to a final determination of the allocation issue, and except the order requiring immediate refunds of the excessive rates collected under the suspended schedules. The order of the Commission is in these respects set aside. The case is remanded to the Commission for further proceedings not inconsistent with this opinion.

Cameron, Circuit Judge, Concurs in the Result.

TUTTLE, Chief Judge, dissenting in part:

Although all members of the Court are in accord on the matters discussed in the main body of the opinion, I respectfully dissent from that part of the opinion that holds that the reduced rate of return cannot be legally effected by a Commission order until the Commission makes the determination of allocation of cost of service.

The significance of this issue is made apparent by the
685 petition of the Columbia Companies. This petition asserts that these companies have consistently opposed the schedules filed by Tennessee to be effective in zones 2, 3 and 4, in which they operated because, so they alleged, Tennessee had allocated its cost of service unfairly against their interests and in favor of zones 1, 5 and 6. It is asserted that by reducing the rate to be charged by cutting from 7 percent to 6⅛ percent the rate of return, this would increase the amount by which zones 1, 5 and 6 are underpaying their proper rates. It is clear that if the Commission should later determine that cost allocations improperly favored zones 1, 5 and 6, the customers in those zones would be benefitted to the extent that they had obtained the gas at the rate now approved by the Commission's interim order. This follows from the structure of the statute which makes rate increases prospective only. In other words, there is no way in which Tennessee could hereafter, if we approve this 6⅛ percent order, collect additional sums to make up for the advantage zones 1, 5 and 6 will have enjoyed because they were favored temporarily with a cost of service allocation improperly weighted in their favor.

Columbia's next contention, however, does not follow from

this fact. Columbia claims to be prejudiced because it says zones 1, 5 and 6 may subsequently be found to have received gas too cheaply at Columbia's expense. It is true that it is possible that the Commission may find that zones 1, 5 and 6 have received gas too cheaply. The weakness of Columbia's position, however, is that Columbia is not, and cannot be, hurt by any such subsequent determination. This follows because the rates which Columbia is now paying are still being paid subject to a final determination as to their lawfulness
686 as to all matters except the rate of returns on the common equity. Thus, it will be entitled to a refund of all amounts it may be found to have paid in excess of the correct rate because of an improper allocation of costs of service. Columbia is now immediately benefitted to the extent that it is paying, subject to refund, on schedules including a 6½ percent rather than a 7 percent rate of return. It is not an aggrieved party merely because the Commission did not proceed to a final determination of other possible savings to it at the same time.

The Columbia companies strongly argue that they are entitled under the statute, as an interested party, to a determination by the Commission of their complaint of undue preferences granted to the other zones in violation of Section 4(b) of the Natural Gas Act. They are undoubtedly entitled to such a determination, but not necessarily before the Commission can eliminate what it finds to be an unlawful increment in the price structure. See State Corporation Com. of Kansas v. F.P.C., 8 Cir., 206 F. 2d 690, cert. den. 346 U.S. 922. Columbia could be hurt in these circumstances only if Tennessee were to be permitted to withhold refunds to which Columbia might become entitled on the ground that it could not recoup from zones 1, 5 and 6, and, therefore, it could not be required to refund excessive charges from zones 2, 3 and 4. As I will next show, this is not the law.

Tennessee claims that there is nothing in the Natural Gas Act that warrants the entry of an order that has the effect of reducing the charges it can make until the Commission decides whether it may not be charging too little from three
687 zones even though it may be charging too much in three others.

The Commission answers this in two ways: (1) the allocation of costs in all six schedules was made by Tennessee. If

these allocations are correct and are approved Tennessee will not be damaged. If they are incorrect they will be corrected and Tennessee will be required to make additional refunds to customers in those zones that were unfairly burdened by the improper allocations, but it will be unable to collect for any increased rates as such that a correct allocation would have warranted from the customers in the zones where there was an unfairly low increment of cost of service. This, the Commission says, is only the natural result of the regulatory scheme envisaged by the Natural Gas Act. The burden rests on the applicant to justify each rate increase. This includes the burden to establish the correctness of the allocation of costs of service as to each schedule filed. Tennessee stands in no different position than if the Commission, after the section 4 hearing, decided that Tennessee was entitled to an overall return of 7 percent on its investment, just as asked for by Tennessee, but decided that the cost allocations between the several zones were discriminatory, as here claimed by Columbia. The Commission would not have the authority to increase the schedules filed by Tennessee in zones 1, 5 and 6, but it would be under the obligation to reduce those for 2, 3 and 4 and make refunds for excess amounts paid by Columbia. See Interstate Power Co. v. Federal Power Com., 8 Cir., 236 F. 2d 372. In such a situation Tennessee would not realize the full permitted rate of return because it would have failed to
688 substantiate the correctness of the cost allocation. Of course, the Commission could, and should under such circumstances, authorize the filing of new schedules to have prospective effect to remedy the allocation imbalance, but it would have no power to authorize Tennessee to collect more from zones 1, 5 and 6 than its filed schedules called for. (2) The Commission has a second answer to Tennessee's criticism in this regard. It seems to say that Tennessee still has several unresolved rate increases pending, all of which affect these same zones, and, if Tennessee is found to have undercharged zones 1, 5 and 6, it may have ample funds collected under bond subject to refund to customers in these zones from which it can recoup for a failure to charge the permissible rate for the period of this present rate proceeding. I think we need not speculate on this matter because I think the first contention elaborated above is sound.

I would affirm the Commission's order in full.

689 In United States Court of Appeals for the Fifth Circuit

October Term, 1960

No. 18547

TENNESSEE GAS TRANSMISSION COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 18597

THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY, AND UNITED FUEL GAS COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Before TUTTLE, Chief Judge, CAMERON and WISDOM, Circuit Judges

Judgment

August 2, 1961

These causes came on to be heard on the petitions of Tennessee Gas Transmission Company and The Manufacturers Light and Heat Co., The Ohio Fuel Gas Company, and United Fuel Gas Company, for review of orders of the Federal Power Commission issued on August 9, 1960 and September 27, 1960 in Docket No. G-19983, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in these causes be, and the same are hereby, approved in part and set aside in part in accordance with the opinion of this Court; and that these causes be, and they are hereby, remanded to the Commission for further proceedings not inconsistent with the opinion of this Court.

"Cameron, Circuit Judge, concurs in the result."
"Tuttle, Chief Judge, dissents in part."
AUGUST 2, 1961,
Issued:

690 In the United States Court of Appeals for the Fifth Circuit

No. 18547

[File endorsement omitted.]
[Title omitted.]

No. 18597

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Order denying petition for rehearing

October 5, 1961

Before TUTTLE, Chief Judge, CAMERON and WISDOM, Circuit Judges

PER CURIAM:

It is Ordered that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby Denied.

Tuttle, Ch. J., Dissenting.

691 In United States Court of Appeals for the Fifth Circuit

[File endorsement omitted.]
[Title omitted.]

Order staying mandate

October 25, 1961

On consideration of the Application of the Respondent in the above numbered and entitled causes for a stay of the mandate of this court therein, to enable Respondent to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said causes be and the same is stayed to and including November 19, 1961; the stay to continue in

force until the final disposition of the case by the Supreme Court, provided that within that time there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or after November 19, 1961, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 25th day of October 1961.

ELBERT P. TUTTLE,
United States Circuit Judge.

694 In United States Court of Appeals for the Fifth Circuit

[File endorsement omitted.]

[Title omitted.]

Order further staying mandate

November 15, 1961

On Consideration of the Application of the Respondent in the above numbered and entitled causes for a further stay of the mandate of this court therein, to enable Respondent to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said causes be and the same is further stayed to December 11, 1961; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within that time there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or after December 11, 1961, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 15th day of November 1961.

ELBERT P. TUTTLE,
United States Circuit Judge.

696 Before the Federal Power Commission

Docket Nos. G–11980 and G–19983

[File endorsement omitted.]

IN THE MATTER OF TENNESSEE GAS TRANSMISSION COMPANY

Answer and objections of New England zone companies to Tennessee Gas Transmission Company's motion to omit intermediate decision procedure on issue of cost allocation

Filed July 29, 1960

Come Now

The Berkshire Gas Company
Blackstone Valley Gas and Electric Company
The Bridgeport Gas Company
Central Massachusetts Gas Company
Concord Natural Gas Corporation
The Connecticut Gas Company
Fitchburg Gas and Electric Light Company
Gas Service, Inc.
The Greenwich Gas Company
The Hartford Electric Light Company
Haverhill Gas Company
City of Holyoke, Massachusetts Gas and Electric Department
The Housatonic Public Service Company
Lawrence Gas Company
Lowell Gas Company
Lynn Gas Company
Manchester Gas Company
Mystic Valley Gas Company
The New Britain Gas Light Company
North Shore Gas Company
Northampton Gas Light Company
Springfield Gas Light Company
Wachusett Gas Company
City of Westfield Gas and Electric Light Department
Worcester Gas Light Company

(the New England interveners) and, pursuant to Section 1.12(c) of the Commission's Rules of Practice and Procedure, file their Answer and Objections to the Motion filed by Tennessee Gas Transmission Company (Tennessee) in which it urges the Commission to omit the intermediate decision procedure on the zone allocation issue presented in Docket No.

G–11980 and to decide the zone allocation issue in that docket simultaneously with the rate of return issue in Docket No. G–19983. The New England interveners respectfully request the Commission to deny said Motion for the following reasons:

697 1. Tennessee failed to file the Motion within the time required by Section 1.30(c)(3) of the Commission's Rules of Practice and Procedure.

2. The Commission would benefit from a decision by the Presiding Examiner who heard the testimony presented and who is now familiar with the various basic zone allocation methods proposed.

3. Omitting the Presiding Examiner's decision would probably not, as a practical matter, expedite a final determination of the zone allocation issue.

MOTION NOT TIMELY FILED

Section 1.30(c)(3) requires that "Requests for waiver and omission of the intermediate decision procedure shall be by motion filed with the Commission at any time during, *but not later than five days next following*, the conclusion or adjournment sine die of the hearing * * *" [Italics supplied.]

Hearings on the zone allocation issue in Docket No. G–11980 were concluded on December 17, 1959. As the Presiding Examiner stated on the last day of the hearing "* * * the hearing of the zone phase of this proceeding its concluded" (Tr. 9170). Briefing dates were set at that time and initial and reply briefs have since been filed. By order dated April 30, 1959 in Docket No. G–11980, the Commission had severed the cost of service issue from the zone allocation issue so that the latter could be heard and decided independently.

69x Inasmuch as this Motion is directed to the sole issue of zone allocation and since it is clear that the hearing is concluded on this issue and that no further hearings will be scheduled, the five (5) day period specified in Section 1.30(c)(3) of the Commission's Rules should be considered as running from December 17, 1959, the last day of the hearing on this issue. Manifestly, Tennessee's untimely filing of this Motion more than seven (7) months after the time specified by the Commission's Rules for such a motion would, in and of itself, require denial of the procedure requested

THE COMMISSION WOULD BENEFIT FROM A DECISION BY THE PRESIDING EXAMINER

The record to date in Docket No. G-11980 covers 9,170 pages of transcript and more than 140 exhibits. Substantially more than half of this record is applicable to the zone allocation issue. This material was presented by the Applicant, the Staff and various interveners over a period of approximately three years and has required a prodigious amount of time energy and expense of each of the parties. We agree that the time for decision is here. The question now to be considered by the Commission is whether omission of a decision by the Presiding Examiner would be in the best interests of all concerned, and particularly in the best interest of the consuming public.

The Presiding Examiner in this proceeding, by reason of his function at the hearing, became familiar with both the testimony and exhibits as they were presented and, therefore, is already conversant with the various basic zone allocation methods proposed. His presence at these hearings permitted him to make specific inquiries of the witnesses whenever he felt clarification was needed. Consequently the Presiding Examiner has been able to obtain a comprehensive grasp of the highly technical aspects of this zone allocation issue and, from first hand observation of the witnesses' presentation, to gain a valuable insight into the relative validity of the conflicting allocation methods. In view of these facts, the New England interveners believe that a decision by this Presiding Examiner would prove to be of great help and value to the Commission. Undoubtedly, the Presiding Examiner's decision would point up the issues in conflict between the respective parties. Furthermore, any exceptions to his decision filed by the parties would bring into still sharper focus the areas of conflict. Most assuredly the Commission itself could perform the tasks and function of the Presiding Examiner, but we submit that the circumstances of this case make it most desirable to have an initial decision by the Examiner who presided throughout this lengthy and most complex trial.

699

In Tennessee's Motion Page 2, it is suggested that the omission of the Presiding Examiner's decision "would serve the best interests of all concerned." We do not agree with this statement. As pointed out previously, we believe that the Presiding Examiner's decision would be of such value to the

ultimate determination of this issue as to be clearly in the best interests of all concerned. Furthermore, the fact that simultaneous decisions of both the zone allocation and rate of return issues might obviate certain "risks" of Tennessee does not constitute a suitable or valid reason for granting its
700 Motion in view of the loss to the general public which would result from omission of the Presiding Examiner's decision.

OMITTING THE PRESIDING EXAMINER'S DECISION MAY NOT, AS A PRACTICAL MATTER, EXPEDITE A FINAL DETERMINATION OF THE ZONE ALLOCATION ISSUE

There is no doubt that all the parties to this proceeding are equally desirous of expediting a final determination of the zone allocation issue as well as the other issues in Tennessee's three pending rate cases (Docket Nos. G–11980, G–17166 and G–19983). What we are here concerned with is the most effective procedure to reach this mutually agreed upon goal.

Apart from the fact that the New England intervenors consider the Presiding Examiner's decision as being of value and essential to the final determination of the zone allocation issue, we believe that as a practical matter omitting this decision would not expedite the case. Assuming that the Presiding Examiner has not as yet begun his final review of the material presented, he at least has had an initial exposure at the time of the hearing sessions to all such material and is familiar with the various basic zone allocation method proposed. It would seem reasonable to conclude that a person in such a position would be able to complete a review of the material relating to the various proposed zone allocation methods considerably quicker than an individual who has not heard the evidence as it was presented. Furthermore, in view of the heavy work load now being carried by the Commission, we submit that a more reasonable approach would be to follow the nor-
701 mal procedure and permit the Presiding Examiner to prepare his decision subject to review by the Commission. In contrast to the tremendous amount of time which would be required of the Commission to review this case (essentially in its entirety) and prepare its decision, the time required to review the Presiding Examiner's decision in the light of the exceptions taken thereto would be relatively small. Under the

circumstances, therefore, we submit it is most doubtful that the Commission's decision could be rendered any earlier by eliminating the assistance which the Presiding Examiner is able to provide in this case. Accordingly, even from a time point of view, the New England interveners believe the interests of all concerned would be best served by permitting the Presiding Examiner to review the material presented and prepare the initial decision.

In conclusion, we further submit there is no reason why the Commission's decision on the rate of return issue (which can be rendered promptly) should be delayed for the substantial period of time it would take the Commission to reach a decision on the zone allocation issue.

702 Wherefore, the New England interveners request that Tennessee's Motion be denied in its entirety.

Respectfully submitted.

The Berkshire Gas Company
Blackstone Valley Gas and Electric Company
The Bridgeport Gas Company
Central Massachusetts Gas Company
Concord Natural Gas Corporation
The Connecticut Gas Company
Fitchburg Gas and Electric Light Company
Gas Service, Inc.
The Greenwich Gas Company
The Hartford Electric Light Company
Haverhill Gas Company
City of Holyoke, Massachusetts Gas and Electric Department
The Housatonic Public Service Company
Lawrence Gas Company
Lowell Gas Company
Lynn Gas Company
Manchester Gas Company
Mystic Valley Gas Company
The New Britain Gas Light Company
North Shore Gas Company
Northampton Gas Light Company
Springfield Gas Light Company
Wa[illegible]husett Gas Company
City of Westfield Gas and Electric Light Department
Worcester Gas Light Company

By (S) JOHN W. GLENDENING, Jr.,
Their Attorney.

JOHN W. GLENDENING, Jr.,
JOHN S. SCHMID,
300 Park Avenue, New York 22, N.Y.
Dated July 28, 1960.

713 Before the Federal Power Commission

Docket Nos. G–11980 and G–19983

IN THE MATTER OF TENNESSEE GAS TRANSMISSION COMPANY

Cross-motion to expedite and answer to motion to omit intermediate decision procedure on issue of cost allocation

Filed July 29, 1960

[File endorsement omitted.]

The Ohio Fuel Gas Company, The Manufacturers Light and Heat Company, and United Fuel Gas Company (Columbia Companies) hereby answer and oppose the Motion of Tennessee Gas Transmission Company to Omit Intermediate Decision Procedure on Issue of Cost Allocation and renew their Motion to relieve Examiner Zwerdling of all other duties in order to expedite these proceedings.

On July 19, 1960, Tennessee Gas Transmission Company (Tennessee) filed a Motion to Omit Intermediate Decision Procedure on Issue of Cost Allocation, which is now pending before Presiding Examiner Zwerdling in Docket No. G–11980. In said Motion Tennessee recites that hearings on the issue of cost allocation were concluded on December 17, 1959, and briefing was concluded on April 11, 1960. In the course of the hearings in Docket No. G–19983, which have occupied a very substantial part of Examiner Zwerdling's time since briefs were submitted in G–11980, the Examiner observed that he had been unable to make any progress on his decision on the allocation issue due to the press of other matters. He estimated that his decision would not be issued until about November. Because of these facts Tennessee urged the Commission to omit the intermediate decision procedure.

Columbia Companies share Tennessee's concern over the delay of the decision in Docket No. G–11980. They be-
714 lieve that the decision on the allocation issue is much more urgent and important to Tennessee and to Tennessee's customers and the consuming public than the hearings in Docket No. G–19983, which have made it impossible for the Examiner to decide the prior case. The decision in G–11980 will affect the trial of Docket No. G–19983 to a very substantial degree. After the allocation issue is decided in

Docket No. G–11980, evidence must be presented in Docket No. G–19983 showing the effect of the approved allocation method upon costs in the latter case. On May 12, 1960, Columbia Companies filed a Motion to Expedite Proceedings, wherein they stated:

"1. On January 14, 1957, Tennessee Gas Transmission Company filed increased rates which were suspended by order in Docket No. G–11980 until July 14, 1957, at which time they became effective subject to refund. Such rates provided increased revenues of $25,527,000 over the final rates in Tennessee's previous case, Docket No. G–5259, based on twelve months ended December 31, 1956. Of such increased revenues, $8,355,000 was obtained from Columbia Companies.

"2. Hearings commenced in Docket No. G–11980 on April 16, 1957, and continued intermittently until December 17, 1959. Briefs were submitted on March 14, 1960, and reply briefs were submitted on April 11, 1960, relating to issues as to how Tennessee's costs should be allocated among its various zones and classes of customers. It should be noted that the Commission, by order issued April 30, 1959, severed the allocation issue and ordered that it be resolved first.

"3. On November 14, 1958, Tennessee filed another rate increase designed to produce $19,184,000 of additional revenues of which $4,802,000 would be obtained from Columbia Companies. Such rates were suspended by order in Docket No. G–17166 until May 15, 1959, at which time they were placed in effect subject to refund. No hearings have been set with respect thereto.

"4. On October 5, 1959, Tennessee filed another rate increase designed to produce $26,864,000 of additional revenues, of which $6,675,000 would be obtained from Columbia Companies. Such rates were suspended by order in Docket No. G–19983 until April 5, 1960, at which time they became effective subject to refund.

715 "5. Hearings commenced in Docket No. G–19983 on February 2, 1960, and were held intermittently for eleven days through April 12, 1960. The next hearing date is scheduled for May 24, 1960. To date, more than 1400 pages of transcript have been recorded on the single issue of rate of return. Examiner Zwerdling, who heard the evidence in Docket No. G–11980 and to whom briefs have been submitted, is also hearing the case in Docket No. G–19983. Even if some issues, such as rate of return, could be resolved quickly in

Docket No. G–19983, the ultimate effect upon rates depends upon the allocation issues to be resolved in Docket No. G–11980. Essentially, until the allocation issue which involves millions of dollars as between zones is resolved, the other issues cannot be finally resolved. The severance of the allocation issue in Docket No. G–11980 underlines the validity of this point.

"It is believed that if the allocation issue in Docket No. G–11980 were decided, many of the other issues in Tennessee's pending rate cases might be disposed of quickly by compromise and settlement.

"The issues now pending before Examiner Zwerdling in Docket No. G–11980 are very substantial and require the Examiner's careful attention. It is respectfully submitted that the Examiner cannot decide such case in a workmanlike manner while he is hearing evidence in other cases. It is further submitted that the trial of part of the issues in Docket No. G–19983 prior to the cost of service phase of Docket No. G–11980 and prior to Docket No. G–17166 will result only in confusion and further delay.

"Wherefore, in order to expedite the determination of the issues in the three pending Tennessee rate cases under which Columbia Companies are paying approximately $20,000,000 per year subject to refund, the Commission is respectfully urged to suspend hearings in Docket No. G–19983 until Docket No. G–11980 has been decided, and insofar as possible, to relieve Trial Examiner Zwerdling of further duties until he is afforded an opportunity to issue a decision in Docket No. G–11980."

By order issued July 7, 1960, the Commission denied said Motion, stating:

"It is our view that it would not be appropriate *at this time* to suspend the hearings in Docket No. G–19983. The Presiding Examiner is fully aware of the importance attached by the parties to the zone allocation issue and, without doubt, gave that matter full consideration in scheduling hearing sessions in Docket No. G–19983. We believe that the matter should be left to his discretion." [1] [Emphasis supplied.]

716 Seventeen days of hearings have now been held in Docket No. G–19983, and oral argument on some of the issues is scheduled to be held before the Commission on

[1] This statement is in apparent conflict with the Commission's order setting Docket No. G–19983 for hearing.

July 29, 1960. Hearings are scheduled to reconvene on December 6, 1960.

Since the Examiner has refused to receive evidence with respect to the allocation of costs in Docket No. G–19983, because the allocation issue is pending on a complete record in Docket No. G–11980, any decision or interim decision in Docket No. G–19983 cannot be implemented until the allocation issue is decided in Docket No. G–11980. It is, therefore, respectfully submitted that the Commission should now suspend proceedings in Docket No. G–19983 until the allocation issue in Docket No. G–11980 has been decided. It is further requested that the Commission relieve Examiner Zwerdling of *all* other duties until his decision in Docket No. G–11980 has been issued. It is submitted that such action would greatly expedite the determination of all of the issues in all of Tennessee's pending rate cases and in numerous rate cases of its suppliers affecting millions of consumers.

During the hearings in G–19983, on July 11, 1960, Examiner Zwerdling stated that other duties had made it impossible for him to make any progress on the decision of the Tennessee zoning issue. (T. 2206) Tennessee then moved on July 19, 1960, to omit the intermediate decision procedure in Docket No. G–11980.

The intermediate decision procedure is of paramount importance in this case. The parties have literally spent years and hundreds of thousands of dollars developing a
717 voluminous and complicated record [2] on the extremely important and seriously contested allocation issue. Examiner Zwerdling heard the testimony and has devoted many months of his time to this important issue. It would be impossible for the Commission to read this voluminous record. It would also be impossible for the Commission to properly evaluate all of the issues without first obtaining a decision by the Presiding Examiner. Millions of consumers have a vital interest in the decision of the allocation issue, and the omission of the intermediate decision would be highly prejudicial to them.

The question posed by Tennessee's Motion is whether Columbia Companies and others who have spent hundreds of thousands of dollars trying this issue on the basis of the facts

[2] Consisting of seventy volumes of transcript and 141 exhibits and numerous items which were incorporated by reference to the Commission's files.

shall be denied the benefit of Examiner Zwerdling's knowledge of the facts. Will their rights to due process become a formality devoid of substance?

Columbia Companies believe that due process is impossible in Docket No. G-11980 without an intermediate decision on the allocation issue. The Commission could not read, analyze and evaluate the evidence within a year. It is submitted that the assistance of its Staff would be prejudicial to Columbia Companies because the Staff has taken an adversary position in the proceeding.

It is respectfully submitted that the Examiner could decide the issues now pending before him in Docket No. G-11980 much more promptly than could the Commission if he
718 were relieved of his other duties and given an opportunity to prepare a decision. It is further submitted that the Commission's failure to thus expedite the decision in Docket No. G-11980 is resulting in unnecessary and unreasonable delay in the determination of Tennessee's other rate cases and the rate cases of its customers. As heretofore pointed out in Columbia's Motion to Expedite Proceedings, many of the other issues in Tennessee's pending rate cases could probably be settled expeditiously by agreement of the parties and the Commission Staff if the allocation issue were first decided.

Wherefore, the Commission is respectfully urged to (a) suspend hearings in Docket No. G-19983 and relieve Examiner Zwerdling of all other duties until an intermediate decision in Docket No. G-11980 has been issued, and (b) deny Tennessee's Motion to Omit Intermediate Decision Procedure in Docket No. G-11980.

Respectfully submitted.

/s/ TILFORD A. JONES,
EDWARD B. CALLAND,
120 East 41st Street,
New York 17, New York.

Attorneys for:
THE OHIO FUEL GAS COMPANY,
THE MANUFACTURERS LIGHT AND HEAT COMPANY, AND
UNITED FUEL GAS COMPANY.

Dated July 29, 1960.

785 [Clerk's certificate to foregoing transcript omitted in printing.]

786 Supreme Court of the United States

No. 591, October Term, 1961

FEDERAL POWER COMMISSION, PETITIONER

v.

TENNESSEE GAS TRANSMISSION COMPANY, ET AL.

Order allowing certiorari

January 22, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with No. 605 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

787 Supreme Court of the United States

No. 605, October Term, 1961

CITY OF PITTSBURGH, PENNSYLVANIA, PETITIONER

v.

TENNESSEE GAS TRANSMISSION COMPANY, ET AL.

Order allowing certiorari

January 22, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with No. 591 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U.S. GOVERNMENT PRINTING OFFICE: 1962